IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 21, 2010

STATE OF TENNESSEE v. KENNETH PAUL NIGHTENGALE

Appeal from the Cocke County Circuit Court
No. 0022 Rex H. Ogle, Judge

No. E2010-00281-CCA-R3-CD - Filed March 31, 2011

The Defendant, Kenneth Paul Nightengale, was convicted by a Cocke County Circuit Court jury of theft over $10,000 but less than $60,000, a Class C felony. See T.C.A. § 39-14-103 (2010). He was sentenced as a Range III, persistent offender to fifteen years' confinement. On appeal, he contends that the evidence was insufficient to support his conviction and that the trial court erred by allowing the State to introduce a statement made by the Defendant but not disclosed during discovery. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the Court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Edward Cantrell Miller, District Public Defender, and Keith Eric Haas, Assistant Public Defender, for the appellant, Kenneth Paul Nightengale.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner and Sophia S. Lee, Assistant Attorneys General; James Dunn, District Attorney General; and Steven Hawkins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to the theft of a Ford pickup truck. At the trial, Wallace Bailey testified that on March 21, 2006, he drove his Ford F-350 truck to work. He said he locked the truck and took the keys with him. He said his boss arrived at 7:30 a.m. and told him that his truck was not in the parking lot. He walked outside and confirmed his truck was missing. He called the police and reported the truck stolen. He said that he bought his truck for $37,000 but that it was worth $25,000 on the day it was stolen.

Mr. Bailey testified that a detective called him three days later and informed him that the police recovered his truck. He said that when he inspected the truck, the door locks and ignition were broken off, a set of vice grips was attached to the ignition, and a screwdriver lay in the console. He said he did not own the vice grips or the screwdriver. He said that he did not know the Defendant and that he did not give anyone permission to drive his truck on March 21, 2006.

On cross-examination, Mr. Bailey agreed that his truck was taken from a fenced parking lot. He said that although security cameras monitored the lot, they did not cover the portion of the lot where his truck was parked. He agreed that he had a tool box in the truck's cabin and another in the bed of the truck, and that the tool box from the bed of the truck was still missing.

Cocke County Sheriff's Sergeant Daniel Connard testified that on the morning of March 22, 2006, he and Officer Ron Rice were assigned to investigate a possible stolen truck parked in the driveway of a home belonging to Marty Williams. He said he parked near Mr. Williams's home and saw a gold F-350 truck matching the description of the stolen truck. He identified a photograph of the driveway and stated that the truck was backed into the driveway and parked next to a bush that hid the license plate. He said he called Detective John Carroll and was told to wait until Detective Carroll arrived. He said that as he waited, the Defendant and Mr. Williams left the house and walked toward the truck, with the Defendant walking directly to the driver's side and Mr. Williams walking to the passenger's side. He said that the Defendant opened the driver's door and that Officer Rice activated their police cruiser's lights. He said that as they approached, the Defendant swung his arm as if to place something in the truck and began walking away from the truck. He said he could not see what was in the Defendant's hand because the Defendant stood behind the door. He said that he ordered the Defendant to stop and that the Defendant complied.

Sergeant Connard testified that a pair of vice grips and a screwdriver lay on the driver's seat of the truck. He identified photographs of Mr. Bailey's truck and agreed that it was the same truck he saw in Mr. Williams's driveway. He said part of the steering column had been removed to allow access to the ignition. He said Detective Carroll arrived, confirmed that the truck was stolen, inspected it, and attempted to start the truck with the screwdriver to move it to a secure location. He said Detective Carroll was unable to start the truck. He said that the Defendant offered to show Detective Carroll how to start the truck and that the Defendant started the truck using the screwdriver.

On cross-examination, Sergeant Connard testified that Detective Carroll did not know how to start the truck before the Defendant explained how to use the vice grips and the screwdriver to start the engine. He agreed a tow truck was not called. He said that he did

not see the Defendant wearing gloves and that he could not see if the Defendant placed anything in the truck as the officers approached. He agreed he did not see the Defendant carrying anything as the Defendant walked toward the truck. He said he initially secured the screwdriver and placed it in his pocket because it could have been used as a weapon. He agreed that vice grips could also be a weapon, but he said that he left them lying on the driver's seat. He said that the screwdriver and the vice grips were not placed in an evidence bag and that they were not tested for fingerprints. He agreed that if he had found the Defendant's fingerprint on the screwdriver, it would be an important piece of evidence. He agreed the truck was not dusted for fingerprints. He agreed he remained with the truck until it was removed from Mr. Williams's driveway. He said he did not remember if any personal items, other than those belonging to Mr. Bailey, were in the truck.

On redirect examination, Sergeant Connard testified that he could not see the Defendant's hands after he opened the truck door and that he did not know if the Defendant had anything in his pockets. He agreed that he was trained to secure items that could be used as weapons as soon as he encountered them and that he secured the screwdriver as soon as he saw it. He agreed that he, Detective Carroll, and the Defendant touched the screwdriver and the vice grips and that dusting those items for the Defendant's fingerprints would have been pointless because the Defendant voluntarily touched the items to demonstrate how to start the truck. He said the Defendant also touched the steering wheel as the truck was started.

On recross-examination, Sergeant Connard agreed that the screwdriver and vice grips were under his control when the Defendant touched them. He agreed that the tools would have been useful items of evidence had they been dusted for fingerprints and had testing showed that the Defendant touched them before he demonstrated how to start the truck.

Cocke County Sheriff's Deputy Ron Rice testified that on the morning of March 22, 2006, he and Sergeant Connard were assigned to investigate a possible stolen truck at a home on Golf Course Road. He said he saw a truck in the driveway that matched the description of the stolen truck. He said that as they waited for Detective Carroll to arrive, the Defendant and another man left the house and walked toward the truck, with the Defendant walking to the driver's side and the other man walking to the passenger's side. He said the two men appeared to be preparing to leave. He said both men walked toward the house after seeing the officers. He said he did not look into the truck. He said the Defendant showed Detective Carroll how to start the truck using the screwdriver and vice grips.

On cross-examination, Deputy Rice agreed that tools found in a stolen car would be evidence and could be checked for fingerprints. He agreed that the tools found in Mr.

Bailey's truck were not checked for fingerprints and that they were used by Detective Carroll to start the truck.

Deputy Rice agreed that the Defendant and the other man walked toward the house after seeing him approach and that both men stopped when told to do so. He said he did not remember seeing anything in either of the men's hands. He agreed that he received a new police cruiser in 2007, that he showed people the new car, and that people looked at his new car from the driver's and passenger's sides.

Cocke County Sheriff's Detective John Carroll testified that on the morning of March 22, 2006, he received a tip from an informant telling him that a stolen Ford F-350 truck was parked in Marty Williams's driveway. He said he sent Sergeant Connard and Deputy Rice to Mr. Williams's home to investigate. He said the truck was in the driveway when he arrived. He said he confirmed the truck was stolen by contacting the Knoxville Police Department. He said Sergeant Connard handed him the screwdriver found on the driver's seat. He agreed that the screwdriver could be used as a weapon and that officers were trained to seize potential weapons. He said he inspected the truck and saw that part of the steering column was removed. He said that he read the Defendant his rights and that he took Mr. Williams aside and spoke to him.

Detective Carroll testified that whenever he felt there was a chance of developing additional information in a stolen automobile investigation, he would move the car to a storage facility himself, rather than call a tow truck, to avoid the attention that a tow truck brought to an investigation. He said that he decided to move Mr. Bailey's truck himself and that moving the truck quickly benefitted his investigation more than collecting fingerprints because additional persons could have been involved in the theft. He said he attempted to start the truck because he had encountered similar thefts in the past and had been able to start cars with broken steering columns by using a screwdriver. He said that he was unable to start the truck and that the Defendant explained how to use the vice grips to twist the cylinder, in addition to using the screwdriver, to start the engine. He could not say if the Defendant reached into the truck and started it himself. He said that the truck was moved to a storage facility and that it was returned to Mr. Bailey later.

On cross-examination, Detective Carroll agreed that the Defendant was detained and handcuffed by officers at the scene. He said the Defendant was handcuffed with his arms in front. He agreed that he started the truck and that the Defendant explained how to do so. He did not think the Defendant reached into the truck and started it. He agreed that the truck was not checked for fingerprints and that he did not find any of the Defendant's personal items in it. He agreed the Defendant and Mr. Williams were near the truck when he arrived. He said that he had known Mr. Williams for nearly thirty years and that he played law

enforcement football games with Mr. Williams. He agreed the Defendant and Mr. Williams were detained but not arrested on March 22, 2006. He agreed he could not say whether the Defendant or Mr. Williams ever sat in the driver's seat or started the truck.

Marty Williams testified that the Defendant arrived at his home as the sun started to rise on March 22, 2006. He said a female drove the Defendant to his home and left. He said that as he was preparing for his day, he walked out to the garage, opened the garage door, and noticed a truck in the driveway. He said he thought the truck was for him because his sister had promised to buy him a truck years earlier. He said that he told the Defendant, "Hey, let's go out to the road," and that the two men walked toward the truck. He said that the police arrived and that he was not arrested.

On cross-examination, Mr. Williams testified that he lived alone and that his mother lived across the street. He said he did not have a job or a driver's license. He agreed he was not allowed to drive because he was a motor vehicle habitual offender. He agreed his sister never told him that she gave him a truck. He said that he and the Defendant were "somewhat" friends and that he could not remember if the Defendant had been to his house previously. When asked how he knew the Defendant, he said, "I've seen him somewhere, I don't know." He said that he did not know who drove the Defendant to his home, what type of car she drove, or what time the Defendant arrived. He said that he and the Defendant "sat around" that morning and that the Defendant never told him why he came to his house. He said he did not know if the Defendant had a screwdriver and that he did not know if other trucks had previously appeared in his driveway. He said he walked toward the passenger's side of the truck because he did not have a driver's license. He said that the police arrived and that the Defendant attempted to return to the house. He agreed he talked with Detective Carroll, but he said he did not remember telling him that the Defendant arrived at his home with the truck the previous night. He said that he never told Detective Carroll the Defendant drove the truck to his house and that he never saw the Defendant drive the truck.

On rebuttal, Detective Carroll testified that he spoke with Mr. Williams on March 22, 2006, and that Mr. Williams told him the Defendant arrived the night before and spent the night at his home. He said Mr. Williams told him that he and the Defendant were the only people at his house that night. He said Mr. Williams did not mention the truck, other than to say he found it in his driveway that morning. He said Mr. Williams did not tell him that a female drove the Defendant to his house that morning.

On cross-examination, Detective Carroll agreed that Mr. Williams did not tell him the truck was at his house the night before police arrived at his home. He agreed that Mr. Williams was not under oath when they spoke on March 22, 2006, and that Mr. Williams was

under oath when he testified. The Defendant was found guilty on the foregoing evidence of theft over $10,000 but less than $60,000.

At the sentencing hearing, the trial court found that the following enhancement factors applied pursuant to Tennessee Code Annotated section 40-35-114 (2006) (amended 2007, 2008): (1) the Defendant had a previous history of criminal convictions, in addition to those necessary to establish the appropriate range; (8) the Defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community; and (13) the Defendant was released on bond at the time the felony was committed and was ultimately convicted of the previous offense. The trial court found that the following mitigating factor applied pursuant to Tennessee Code Annotated section 40-35-113 (2010): (1) the Defendant's criminal conduct neither caused nor threatened serious bodily injury. The Defendant was sentenced as a Range III, persistent offender to fifteen years' confinement. This appeal followed.

I

The Defendant contends that the evidence was insufficient to support his conviction. He argues that the State failed to prove that he exercised control over the stolen truck. The State contends that the evidence was sufficient to support the jury's verdict. We agree with the State.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). This means that we may not reweigh the evidence but must presume that the trier of fact has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Any questions about the credibility of the witnesses were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

Circumstantial evidence alone may be sufficient to support a conviction. State v. Richmond, 7 S.W.3d 90, 91 (Tenn. Crim. App. 1999); State v. Buttrey, 756 S.W.2d 718, 721 (Tenn. Crim. App. 1988). The jury decides the weight to be given to circumstantial evidence and "'[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.'" Marabel v. State, 313 S.W.2d 451, 457 (Tenn. 1958) (quoting 2 Wharton's Criminal Evidence 1611). The standard of proof is the same, whether the evidence is direct or circumstantial. State v. Genaro Dorantes, No.

M2007-01918-SC-R11-CD, ___ S.W.3d ___, slip op. at 12 (Tenn. Jan. 25, 2011). Likewise, appellate review of the convicting evidence "'is the same whether the conviction is based upon direct or circumstantial evidence.'" Id., ___ S.W.3d at ___, slip op. at 10 (quoting State v. Hanson, 279 S.W.3d 265, 275 (Tenn. 2009)).

"A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." T.C.A. § 39-14-103. Theft of property is a Class C felony if the value of the property taken is $10,000 or more but less than $60,000. T.C.A. § 39-14-105 (2010).

The possession of recently stolen goods "gives rise to an inference that the possessor has stolen them." State v. Tuttle, 914 S.W.2d 926, 932 (Tenn. Crim. App. 1995). Actual possession occurs when a person "knowingly has direct physical control over a thing, at a given time." State v. Edmondson, 231 S.W.3d 925, 928 (Tenn. 2007). Constructive possession occurs when a person "knowingly has both the power and the intention at a given time to exercise dominion or control over a thing . . . ." Id. "Control" means "to exercise power or influence over" an item. Black's Law Dictionary (8th ed. 2004).

Taken in the light most favorable to the State, there was sufficient evidence to allow the jury to find beyond a reasonable doubt that the Defendant exercised control over the stolen truck. Mr. Bailey testified that his truck was stolen on March 21, 2006, and that he did not give anyone permission to drive the truck that day. He said that the truck was worth $25,000 on the day it was stolen and that he did not own the screwdriver and vice grips found in the truck. Detective John Carroll testified that on the morning of March 22, 2006, he received a tip from an informant telling him that a stolen Ford F-350 truck was parked in Mr. Williams's driveway. Mr. Williams was unable to explain how he knew the Defendant, why the Defendant was at his home, or how the truck appeared in his driveway the day after it was stolen. The truck was backed into the driveway and placed next to a bush that hid the truck's license plate. Mr. Williams said that after seeing the truck in his driveway, he told the Defendant, "Hey, let's go out to the road," and that the two men walked toward the truck. Sergeant Connard testified that the Defendant walked out of Mr. Williams's house, walked directly to the driver's door, and opened the door. He said that as the officers approached, the Defendant swung his arm as if to place something in the truck and walked away from the truck. He said that a pair of vice grips and a screwdriver lay on the driver's seat of the truck and that part of the steering column had been removed to allow access to the ignition. Despite his experience with similar thefts, Detective Carroll was unable to start the truck. The Defendant explained to Detective Carroll that he had to use the vice grips to twist the cylinder, in addition to using the screwdriver, to start the engine.

We conclude that a rational trier of fact could have found the elements of theft beyond a reasonable doubt. We hold that the evidence is sufficient to support the Defendant's conviction.

II

The Defendant contends that the trial court erred by allowing the State to introduce a statement made by the Defendant that was not disclosed to him during discovery, as required by Rule 16(a)(1)(A) of the Tennessee Rules of Criminal Procedure. He argues that his statement should have been ruled inadmissible because the State waited until the morning of the trial to advise him that he made a statement to Detective Carroll explaining how to start the stolen truck. The State contends that because the Defendant's statement was voluntary and not in response to interrogation, Rule 16(a)(1)(A) does not apply, and the State was not required to disclose the statement pursuant to the rule. We agree with the State.

Rule 16(a)(1)(A) of the Tennessee Rules of Criminal Procedure states:

> Upon a defendant's request, the state shall disclose to the defendant the substance of any of the defendant's oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the state intends to offer the statement in evidence at the trial.

If the State fails to comply with this rule, the trial court may fashion an appropriate remedy, including prohibiting the State from introducing the undisclosed evidence. See Tenn. R. Crim. P. 16(d)(2). "[T]he right to discovery here is statutory and not constitutional, and [this] court may only determine whether the statutory right has been violated . . . ." State v. Balthrop, 752 S.W.2d 104, 108 (Tenn Crim. App. 1988). If a statement is not the result of police interrogation, the State's failure to disclose the statement does not render it excludable under Rule 16(a)(1)(A). See id.

The record reflects that the Defendant's statement was voluntary and that it was not the result of questioning or other acts likely to elicit an incriminating response. Sergeant Connard testified that when Detective Carroll was unable to start the truck, the Defendant offered to show the detective how to start it. We hold that because the Defendant's statement was not the result of police interrogation, the State's failure to disclose the statement did not render it excludable under Rule 16(a)(1)(A) of the Tennessee Rules of Criminal Procedure. The Defendant is not entitled to relief.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE